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Ontario Gas Prices Review Task Force Report

Fairness at the Pump

Presented to

The Hon. R.W. Runciman

**Minister of Consumer and Commercial
Relations**

29 June 2000

A Message from the Task Force

This report is based on the input from a wide range of individuals and organizations from across Ontario. All of the people who participated in the consultation process had a common concern for the economic well being of our province.

Few could have predicted the magnitude of the increase in gasoline prices in Ontario over the past year. This spike has led to a sense that we must more closely examine the influences on gasoline prices, help the people of Ontario know the facts and determine what can be done to ensure we have a more transparent and understandable system for setting gas prices.

To that end, the Gas Prices Review Task Force was established to investigate the gas-pricing situation in Ontario. As such, the Task Force represents a first step in efforts by the Ontario government to ensure a fair deal for Ontario consumers.

Although there was a diversity of opinion presented before the Task Force, there were some common threads within some of the key stakeholder groups, among them:

- ❖ Consumers are very frustrated with the high price of gas and believe that this can be attributed, at least in part, to a perceived lack of competition in the gasoline industry.
- ❖ Independent retailers believe they are the victims of unfair competitive practices by the integrated oil companies (those that both refine and retail gasoline).
- ❖ The oil companies assert that Ontarians are well served by a competitive retail market for gasoline.

The Task Force has made 14 recommendations, which are aimed at the provincial government, the federal government or the oil companies.

We believe there are a number of steps the Ontario government could take that would help to educate consumers and produce a more informed marketplace. Similarly, the report outlines a number of steps the oil companies could take voluntarily that would increase the transparency of their pricing practices.

We believe, however, that the heart of the solution to high and volatile gas prices lies in a more competitive marketplace. Only the federal government has the jurisdiction to address the competition issue by strengthening the provisions of the *Competition Act* and by ensuring that the Competition Bureau has the resources it needs to enforce those provisions.

The message from the public is clear – action is needed both to protect and inform the consumer. Across Canada, provincial and territorial governments, consumers and the transportation industry have been calling upon the federal government to act. It is our hope that the federal government will use this report, as well as the report they have already received from their own MPs, to take concrete action to ensure fair fuel prices for consumers.

We hereby submit this report to the Minister of Consumer and Commercial Relations.

29 June 2000

John O'Toole, MPP, Co-Chair

Joe Tascona, MPP, Co-Chair

Ted Chudleigh, MPP, Task Force Member

(Hon. Dan Newman, MPP, was also a Task Force Member until 7 March 2000)

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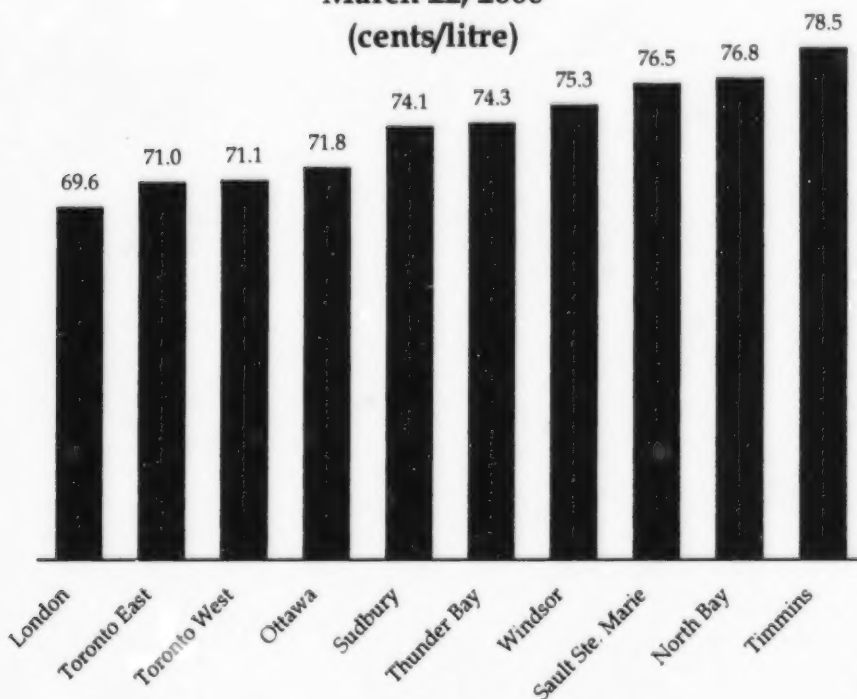
About Our Task Force

In July 1999, consumers in Ontario were shocked by sudden gas price increases, such as the early July 10 cent increase that saw pump prices in parts of the province increase from 49.9 to 59.9 cents per litre overnight.¹ Since then, the provincial government's Gas Busters Hotline has received over 4,000 complaints from consumers on the price of gas.

"The Ontario government shares drivers' concerns about high gas prices."

Speech from the Throne

**Average Price at the Pump
in Cities Across Ontario
March 22, 2000
(cents/litre)**



"I don't know whose fault it is. I don't care whose fault it is. All I know is that we can't afford these prices."

**Bob Tindall
(Thunder Bay
Consultation Session)**

Source: Ontario Ministry of Energy, Science and Technology

¹ See for example, "Dime a litre gas hike has drivers crying foul," *The Globe and Mail*, July 8, 1999 at A9; "Price cycle' at pumps continues its course," *The National Post*, July 8, 1999 at B4.

By March 2000, world crude oil prices had risen to \$34 U.S. per barrel, resulting in most Ontario consumers paying well over 70 cents² for one litre of regular unleaded gasoline at a self-serve pump. However, depending on the community, there could be up to a 10 cent a litre difference in the price Ontario consumers were paying for gas.

After mounting consumer outrage about the rising price of gas during the summer of 1999, the Government of Ontario announced in the fall of 1999 that it would establish the Gas Prices Review Task Force. The purpose of the Task Force was detailed in the Speech from the Throne on the opening of the First Session of the Thirty-Seventh Parliament of the Province of Ontario:

"To help identify an appropriate solution, your government will establish its own full investigative review of gasoline pricing, and share the results with the Canadian government...."

On November 17, 1999 Consumer and Commercial Relations Minister Bob Runciman announced the creation of the Gas Prices Review Task Force, which was mandated to:

- ❖ invite the participation and input from representatives of consumer groups, industry and other identified stakeholders;
- ❖ conduct policy options research, including consideration of the effectiveness of market competition in regulating gas prices to ensure fair prices for Canadians and the experiences in other jurisdictions with regulatory mechanisms;
- ❖ examine what regulatory or legislative initiatives, under the federal Competition Act, would best protect consumers from volatile and high gas prices; and,
- ❖ submit a report to the Minister of Consumer and Commercial Relations.³

"Consumers are fed up with having to pay more for gas every time they go to work, the supermarket or visit relatives. The Ontario government is launching this review because the federal government is ignoring the concerns of Ontarians about gas. It's our hope the review will help spur the federal government to take action."

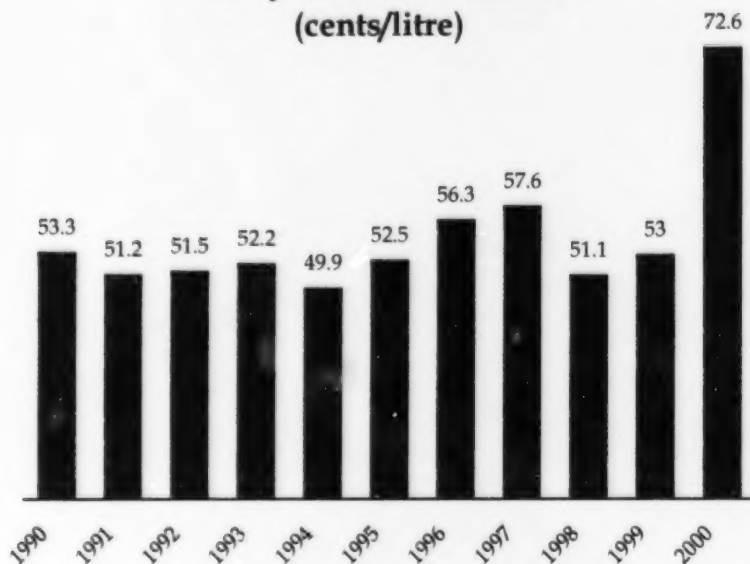
**Hon. Bob Runciman
Minister of Consumer &
Commercial Relations**

² Source: Ontario Ministry of Energy, Science and Technology.

³ Source: MCCR, Backgrounder, Ontario review of gasoline prices seeks to spur federal government into action, November 17, 1999.

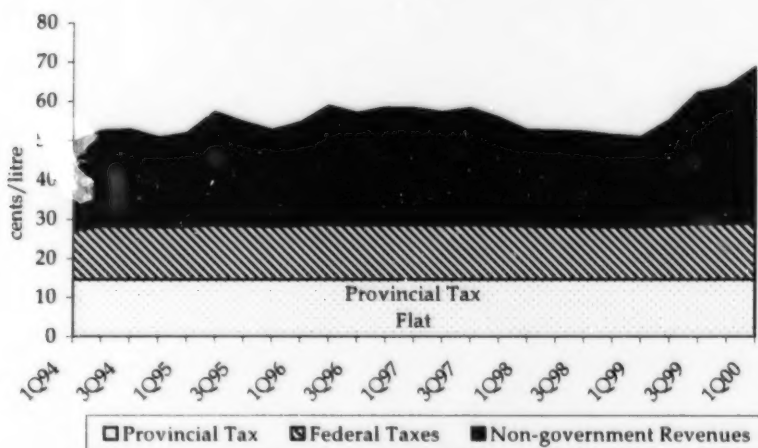
MARKET TRENDS

Your Price at the Pump Every March in Ontario (cents/litre)



The price of gasoline this year has broken all the records.

Gasoline Pump Price Components Ontario (1994-2000)



With the exception of the federal GST, the federal and provincial taxes on gasoline are flat.

Volatility in the price of gasoline is directly attributable to the industry and it's suppliers.

Sources: Ministry of Energy, Science and Technology

Summary of Recommendations

1. That the Ontario government forward all submissions received by the Task Force to the federal Competition Bureau for immediate investigation into allegations made to the Task Force of anti-competitive business practices, including the use of "price zones".
2. That the Ontario government undertake a review of current tax collection legislation (i.e. "tax collector status") and remove unnecessary financial barriers which may discourage the establishment of independent gasoline retailers. The presence of independent gasoline retailers is an important component of a truly competitive marketplace, which ensures the consumer fair gasoline prices.
3. That the Ontario government expand its price monitoring of retail gasoline prices during the peak driving season to better assess pricing behaviour before long weekends. The timing of the surveys should not be disclosed in advance.
4. That the Ontario government consider whether a statutory requirement that gasoline retailers provide advance notification of price changes at the point of sale could benefit consumers without creating opportunities for price manipulation and price "signaling" that would make enforcement of competition laws difficult.
5. That vertically integrated oil companies voluntarily produce segmented earnings reports in order to allow for a transparent understanding of the actual profits made at the pump. If the companies are unwilling to undertake this voluntary measure, the Ontario government should consider requiring segmented earnings reporting by vertically integrated oil companies
6. That gasoline retailers voluntarily initiate a policy of "ownership transparency" where retail locations partly or wholly owned by another oil company would have on their sign or receipt "...wholly [or partly] owned by ____" so that ownership relationships are clear and competition transparent. If gasoline retailers are unwilling to undertake this voluntary measure, the Ontario government should require this measure, using the powers already available to the Minister of Consumer and Commercial Relations.
7. That the big oil companies do a better job of explaining the causes of price volatility and pricing levels to their own customers.

8. That the federal government act to shift the burden of proof for investigations under the *Competition Act* to the person/organization accused of anti-competitive business practices.
9. That the federal government act to allow for private right of action under the *Competition Act* through the courts to effectively and immediately launch injunctions and to sue for three times the damages resulting from anti-competitive business practices, such as price discrimination and predatory pricing.
10. That the federal government take action in order to make offenses such as price discrimination and predatory pricing which are criminal offenses under the *Competition Act*, civil prohibited conduct similar to US anti-trust law.
11. That the federal government provide the Competition Bureau with sufficient resources to enable it to effectively enforce a strengthened *Competition Act*.
12. That the federal government use its current consultation process on amendments to the *Competition Act* to consider the inclusion of "divorcement" legislation nationally, which would prohibit companies from being both a refiner and retailer of gasoline.
13. That the federal government increase investments in Ontario's highway infrastructure, given the substantial revenues derived from federal taxes on gasoline.
14. That the federal government act on the recommendation of the *Report of the Liberal Committee on Gasoline Pricing in Canada* to "remove the GST from other taxes and apply it only to the wholesale price for gasoline plus the retailer margin."

Listening to Ontarians

It was appropriate and timely that, with the price of gasoline in Ontario at a then all-time high in February and March of 2000, the Task Force received comments and feedback from stakeholders across the province on the issue of gasoline pricing.

In order to collect the full range of consumer and stakeholder opinion, a two-part consultation process was initiated. First, the Task Force members traveled to communities across Ontario to gather information and formal feedback from consumers, retailers and interested industry stakeholders in February and March 2000.

Second, individuals unable to participate directly in the public consultations were encouraged to provide their input by sending a written submission to the Task Force by mail, fax or electronic mail.

A wide range of stakeholders, including concerned taxpayers; small businesspeople; truckers; independent gasoline retailers; public interest groups and; the oil and gas companies, made submissions. For a full list of the individuals and organizations that made submissions during the consultation sessions, please refer to **List of Participants**.

Overall, the Task Force hosted eight public consultations sessions across Ontario during the months of February and March 2000.

Toronto	February 14
Chatham and Sarnia	February 15
Thunder Bay	February 21
Sault Ste. Marie	February 22
Clarington	March 1
Ottawa	March 3
Barrie	March 7

Public Participation

- ✓ **eight consultation sessions across Ontario**
- ✓ **80+ formal submissions**
- ✓ **over 4,000 messages with consumer feedback at the Gas Busters Toll-free Line**
- ✓ **300+ e-mail messages and letters**

All of the input received through the public hearings or by written submissions was reviewed and analyzed by the Task Force and forms the basis for this report and the recommendations it contains.

What Consumers Told Us

If there is one word which best characterizes the feelings of consumers relating to the gas price issue it is frustration. Whether one commutes to work by car or operates a driving school or a trucking business, gas is a basic necessity. Ontarians consume over 13.2 billion litres of retail gasoline every year.⁴ The jump of only a few cents in the cost of fuel has a tremendous impact on our economy.

The Task Force was impressed by the scope and depth of knowledge on the part of the public when it came to issues related to gasoline. It highlighted to the Task Force the degree to which the public monitored the various aspects of the gasoline issue.

One issue raised by the public, which was not directly related to the mandate of the Task Force, was the use of additives in gasoline and the level of certain pollution related components in gasoline. The Ontario Ministry of the Environment is looking into these and other issues that relate to air quality.

Many consumers who made presentations before the Task Force expressed concern with both the high and volatile price of gasoline and the way in which the oil companies appear to set prices. Participants described their perception that they were being gouged, that prices were fixed, and that the oil companies were insensitive to the situation.

Consumers expressed confusion about how the industry operates and how the price of gas is set on a day-to-day basis. Following, are the thematic highlights of the feedback collected from across the province.

"I'm totally dependent on my car and gas stations and I'm very upset when representatives from the oil companies say Canadians are a bunch of whiners."

**Chris Cosby
(Thunder Bay
Consultation Session)**

⁴ Statistics Canada, Estimated Total Retail Sales Volume, 1999.

Setting the Price

Consumers were upset with the rapid and seemingly coordinated way in which the price of gas can change. Numerous submissions noted the way in which all gasoline retailers in a given municipality would raise their prices apparently in sync. These increases could range from a few cents to nine or 10 cents per litre. Several presenters went to great lengths to explain how they had tried to monitor the timing and reasons for these increases in an attempt to better understand the forces at play. The Task Force heard how these efforts sometimes raised more questions than they answered for consumers – ultimately leading to even greater suspicions about the pricing practices in the industry.

Similar sentiments were expressed by organizations that track the price of gas across the province. For example, an Internet-based organization known as Stop4Gas Enterprise Ltd. reports on the price of gas across the Greater Toronto Area. In Stop4Gas Enterprise Ltd's formal submission before the Task Force, David Ge stated,

"We notice that when price rises, all major-brand gas stations, namely Petro-Canada, Esso, Shell, will do so at the same time, to the same amount, and throughout the GTA area. However, when price drops, each station will drop it at a different rate. It will be very interesting to know how those major oil companies decide their prices and why all their gas stations raise prices simultaneously."

Price Differences Between Communities

Many consumers were also very concerned about the large price discrepancies between communities. For example, during the Task Force consultation session in Sarnia, one submitter questioned why the price of gas was higher in Sarnia than in Toronto. The submitter wished to know how the differential could be justified, since gasoline was refined in Sarnia, and transportation costs for Sarnia gas stations would presumably be lower than for other markets such as Toronto.

"I have been told that gas is higher in the North because of higher transportation costs of delivery. I see no reason for this justification."

Don Edwards (Sault Ste. Marie Consultation Session)

Similar statements were heard at other consultation sessions, especially those in northern Ontario. In Thunder Bay, Patrick Sayeau, President of McLeod Transportation (Red Lake) Ltd., told the Task Force that he believed the gas pricing structure in Northern Ontario was detrimentally affected by insufficient competition. Based on his observation of prices in different communities in northwestern Ontario and their respective distances from the common refinery gate (in Winnipeg), he said that that he did not believe transportation costs in Northern Ontario could adequately explain variations in price.

The Thunder Bay Chamber of Commerce was very concerned about the negative impact of high gas prices on the local economy. The Chamber proposed voluntary pooling of distribution costs by the industry:

"One avenue worth exploring is an approach outlined by the Northern Ontario Transportation Coalition (NOTC) in May 1995. That group examined the issue of fuel pricing and suggested that fuel companies voluntarily agree to pool their distribution costs so that regardless of where the pump is located, the dealer is charged the same per litre as any other dealer across the province.... We do it for beer; WAL-MART and the Future Shop do it for their products; as do Sears and Zellers, not to mention Canada Post.... That is not to say that the pump price itself is equal. There will still be the realistic requirement for the operator to base his or her price on the volume of fuel sold at that location."

Submissions consistently emphasized that the reasons for price fluctuations in general or for price differentials between communities were difficult to determine and those explanations, when provided by the oil companies, were inadequate.

The Competition Act

The Task Force repeatedly heard that the federal competition legislation and the Federal Competition Bureau were ineffective, toothless and slow to respond. As one presenter noted:

A government agency (the Competition Bureau) that takes ten months to investigate one small complaint is clearly ineffective. Perhaps we need

*an agency that won't try to buy time to hope that the problem goes away or gets stale.*⁵

Similarly, the Task Force heard from consumers that there was a perceived lack of competition between the major retailers and that the market was dominated by a handful of oil companies. Submitters felt that the Competition Bureau lacked teeth or did not have sufficient resources to act quickly and effectively.

The Task Force was left with the general sense that Ontarians were not well served by the Competition Bureau and that the current *Competition Act* did not provide the tools needed to ensure fair competition.

The Task Force was especially concerned with the current ability of the *Competition Act* to address allegations of the following:

- Price discrimination (where different retailers are charged different prices by the same supplier);
- Predatory pricing (where one company temporarily charges a low price to deter, reduce or punish competition);
- Price maintenance (maintaining a set price, either alone or in collusion with competitors) ; and
- Abuse of dominance (where a company with a strong presence in a market can maintain prices at a set level to reduce competition, or undertake other anti-competitive practices).

A complete description of these practices can be found in Appendix III, in the excerpt from *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*.

The Task Force noted that the federal government is well aware of the shortcomings of the current *Competition Act*, especially as it relates to the gasoline retail industry.

⁵ Submission by Mike Crombez, Chatham Consultation Session.

The Report of the Liberal Committee on Gasoline Pricing in Canada (the McTeague Report) was released in June 1998 and raised a broad range of consumer concerns in the area of gasoline pricing. It called upon the federal government to strengthen the *Competition Act*.

Industry Canada provided a detailed response to the McTeague Report on June 10, 1998. At the time, Industry Canada maintained that the *Competition Act*, as currently drafted, was sufficient to deal with many of the issues raised. The Task Force agrees with the conclusions of the McTeague Report, which contends that the *Competition Act* needs to be strengthened to provide better tools to gather evidence of violations, and that the federal government should appoint a special investigator to enforce a revised *Competition Act*, in order to better protect consumers.

The McTeague Report resulted from a Liberal caucus committee created in the fall 1997 to examine gas pricing. The committee, chaired by MP Dan McTeague, held hearings involving consumer groups, oil industry representatives and government officials. Industry officials were called to the hearings on November 19, 1997, and denied that the industry is conspiring to fix prices.

Industry Canada has until recently opposed adoption of proposals contained in the McTeague Report. However, Industry Canada has now announced that it has incorporated these proposals, as well as other proposals that would improve competition in the gasoline retail industry, into a package of four Liberal private member's bills, which it will consider as amendments to the federal *Competition Act*.

Aspects of the proposed amendments that would assist in improving competition in the gasoline retail market include improved definitions of and penalties for collusion, the ability for private citizens to take legal action against anti-competitive practices, and stronger powers for the Competition Bureau to deal with anti-competitive practices. In addition, new definitions of practices that discourage the entry of new retailers into a market, or push out or punish existing retailers would be included in the *Competition Act*.

Infrastructure and Taxes

Although there was a general consensus that taxes collected on gas should be used primarily to invest in and maintain our road infrastructure, there was no consensus on the issues of tax relief. Many of the respondents, including business representatives, clearly understood that the taxes were necessary, as stated by the Thunder Bay Chamber of Commerce.

"First of all, the Chamber does not believe that a reduction in fuel taxes is the answer, at least not in the long term. Our preference is that the existing taxes be dedicated to highway construction and maintenance. We do not mind paying for services we use, as long as we can see that revenue is going to directly enhance those specific services."

Other groups, such as the Ontario Trucking Association and Canadian Federation of Independent Business (CFIB), recommended that the Ontario government extend relief on fuel taxes. The CFIB also supported the concept of the federal government removing the tax-on-tax treatment of the GST on fuel excise taxes and provincial taxes.

During the course of the consultations, it was clear that many members of the public believed that as the price of gasoline increased, the amount of money that went to the provincial and federal governments also increased. Task Force members took the opportunity to explain that both the federal excise tax and provincial consumption tax on fuel are flat taxes

(fixed at 10 cents per litre and 14.7 cents per litre respectively). Therefore, the rising price of gasoline adds no additional government revenues from these taxes. Only the amount of money that goes to the federal government through the GST increases with the price of a litre of gas. Some individuals commented that the taxes were portrayed as a percentage by the oil companies and the media, which created confusion.

The Ontario government has already taken steps to remove some of the taxes related to the cost of driving. Through the recent Ontario budget, the Retail Sales Tax rate on motor vehicle insurance premiums was immediately reduced to 4%, with further yearly 1% reductions until the Retail Sales Tax is totally eliminated in 2004. In addition, the Retail Sales Tax rate on vehicle repairs and replacements made under warranty was immediately reduced to 6%, with future reductions yearly until it is fully eliminated in 2004.

While the Ontario government had many requests to lower the tax on fuel, the government is concerned consumers might not receive the full benefit of such a decrease (For a full explanation of the New Brunswick experience in this regard, please see page 31). The reduction to the Retail Sales Tax rate on these automobile related items ensures that consumers receive the full benefit from the tax reduction.

What Independent Gas Retailers Told Us

Whereas consumers are frustrated about the price of gas, independent gas retailers believe that they have been the "victims" of alleged unfair competitive practices by the oil companies. For the independents, the best means of ensuring fair prices to consumers is to bring transparent and fair competition to the marketplace. The Task Force wishes to be clear that the focus of representations by independents was not that oil companies had broken the law, but rather that the existing law (i.e. the federal *Competition Act*) does not provide an adequate legislative framework or sufficient tools to the Competition Bureau (which must enforce the Act) to guarantee a healthy, fair and competitive market.

The lead advocate for this group is the Independent Retail Gasoline Marketers Association (IRGMA). The following synopsis of opinion was based on the submissions provided by IRGMA and individual independent gas retailers from across Ontario.

Level the Playing Field

According to IRGMA, an alleged lack of competition in the Canadian petroleum industry is the underlying reason for unfair gasoline prices. They are concerned that in Ontario as few as four major petroleum companies control a large majority of the volume of gasoline sold at wholesale and at retail gasoline stations.⁶

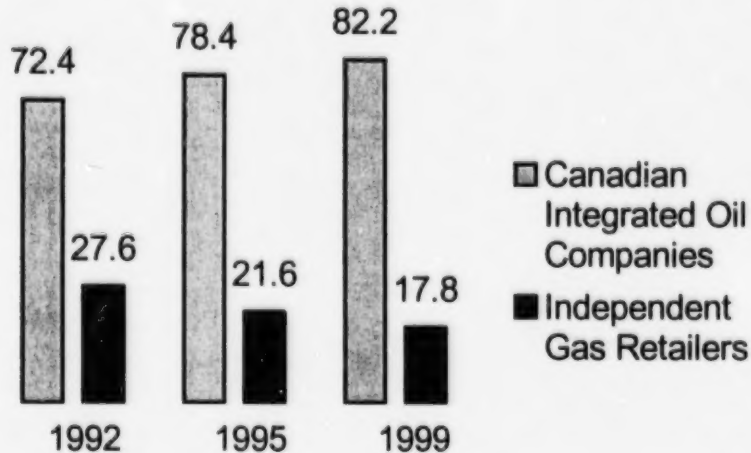
"Different stakeholders have offered a variety of recommendations to resolve this ongoing consumer problem - some believe the solution is reduced taxes and others believe it is regulation of the industry. It is our opinion, that neither solution will benefit the consumer in the long run."

Independent Retail Gasoline Marketers Association of Canada (from supplementary, written submission, "Gasoline Industry Needs Competition")

⁶ Presentation to the Gas Prices Task Force on behalf of the Independent Retail Gasoline Marketers' Association of Canada with respect to Strengthening the Federal Competition Act to Address Unfair Gasoline Prices" (Ottawa, M.A. Kelen).

THE DECLINING INDEPENDENT GASOLINE INDUSTRY

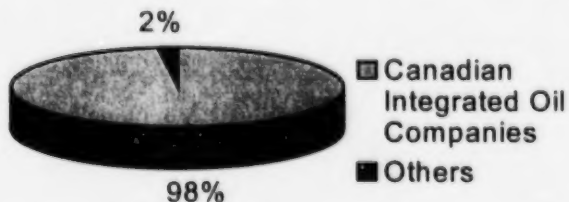
Percentage Market Share Retail Gas Sold in Ontario



Since 1992, the market share of true independent gas stations has dropped by one-third.

Independents are not owned or controlled by integrated oil companies (i.e. Esso, Shell, Petro-Canada and Sunoco).

Who Produces the Gasoline Sold in Ontario?



Sources: Ministry of Energy, Science and Technology

IRGMA argues that the playing field can be leveled to the benefit of consumers by toughening the federal *Competition Act* so that the federal Competition Bureau has the ability to adequately pursue, investigate and prosecute companies that engage in discriminatory business practices.

The presence of independent gasoline retailers is an important component of a truly competitive marketplace, which ensures the consumer fair gasoline prices. Investigations carried out in both Canada and the United States, examples of which include the *Report of the Liberal Committee on Gasoline Pricing in Canada* and the *Report on Gasoline Pricing in California* by the Attorney General of California, have stressed the linkage between a healthy and competitive independent gasoline retail market and lower gasoline prices. Changes to the federal *Competition Act* would ensure that the independent retailers have a fair opportunity to compete.

To date, the Government of Canada has not been responsive to the requests made by IRGMA or even to the *Report of the Liberal Committee on Gasoline Pricing in Canada*. As a result, IRGMA has asked that the province consider a series of recommendations to improve competition and to advocate for changes to the federal *Competition Act*.

A Tougher Canadian Competition Act

IRGMA cites the U.S. *Clayton Anti-Trust Act* as the model for ensuring fair competition in the market place and uses the U.S. legislation as the basis for its recommended changes to the Canadian *Competition Act*. The key changes to the federal *Competition Act* requested by IRGMA include:

1. That criminal competition offences, such as price discrimination and predatory pricing, under the current *Competition Act* be made civil prohibited conduct (as under US anti-trust law)
2. That the onus of proof for proving such prohibited conduct shift to the alleged offender upon a prima facie case being presented by the complainant (as under US anti-trust law)

"Mergers approved by the Competition Bureau over the last two decades have led to a considerable concentration in the Canadian industry."

**Independent Retail
Gasoline Marketers
Association of Canada**

3. That any person who is injured in business by any prohibited conduct under the amended Competition Act, such as price discrimination or predatory pricing, may sue in any superior court for three-fold damages and/or an injunction (as under US anti-trust law)
4. That any Attorney General for any province may bring a legal action in any superior court with respect to prohibited conduct under the amended Competition Act (as under US anti-trust law)
5. That 'anti-competitive acts' as defined under the current section 78 of the Competition Act be converted from "reviewable trade practices" to prohibited anti-competitive conduct.

Tax Collector Status

A number of independent gasoline retailers commented that the provincial Ministry of Finance is inflexible in the issuance of Tax Collector Licences. These licences are issued to retail organizations to allow them to collect provincial tax and then remit it to the province. If a retailer does not have a licence, then the retailer must pay the taxes to the gas wholesaler when the gas is delivered.

Payment of the tax at the time of gasoline delivery places a cash flow problem on the small independent retailer, as they must pay the tax prior to collecting it. Combined with the need to have sufficient financial resources to pay for the fuel in advance, this was seen both as a further barrier to new independent retailers entering the market and a potential factor in forcing existing independent gasoline retailers out of business.

A number of presenters argued that the Ontario Ministry of Finance should have a more thorough and flexible application process that also examines an applicant's financial position and track record.

"Bureaucrats want it easy. They don't care whether they give it (the tax licence) out - they don't ask for financials."

**Richard Hammond
VP, GRA-HAM Energy
(Chatham Consultation
Session)**

Segmented Earnings

IRGMA also proposed that the Ontario government instruct the Ontario Securities Commission to require segmented earnings reports for integrated oil companies. The proposal would involve having the integrated oil companies segment their report by showing the earning for the crude and natural gas production (resource recovery), refining (manufacturing), and marketing (wholesale vs. retail). This change, according to IRGMA, would improve customer understanding of marketing and refining operations, enhance price transparency and also result in consistent reporting guidelines. Currently, Petro-Canada and Sunoco voluntarily segment their earnings reports in this fashion.

"Without your [the Task Force's] support, and that of the Ontario Government, the Independents will become nothing more than a fond memory. And we all know who will pay the price then -- the Consumer"

**Allan MacEwen
President
MacEwen Petroleum
(Ottawa Consultation
Session)**

Infrastructure

There was considerable concern among independent retailers regarding this issue. Allan MacEwen, the President of MacEwen Petroleum Inc. told the Task Force:

*"The majors now control all Terminals and product supply in Ottawa. When there was an Independent Supplier (Coastal), the larger Independent customers had opportunities to negotiate storage, thruput, credit and price. With any of the Majors (Esso, Shell, Petro-Canada, Sunoco, Ultramar) there are no negotiations. They set the deal - take it or leave it. Wholesale terms, rack, prices, credit terms, etc., are virtually identical 365 days/year amongst all the Majors...."*⁷

IRGMA has asked the provincial government to consider investment in or support of terminals to address the concentration of control over the wholesale side of the industry in Ontario. Some of the submissions received by stakeholders were critical of the Competition Bureau's role in

⁷ Written submission from Allan MacEwen, Ottawa Consultation Session.

allowing the specific concentration of control over the wholesale infrastructure that has developed in Ontario.

Zone Pricing

Zone pricing is the practice of providing dealers with a delivered price within a defined geographic market. Most oil companies in Ontario operate either zone pricing or some variation of this practice. Each of these zones may have a different delivered wholesale price for gas.

A preliminary report to the Attorney General of California, dated November 1999, was submitted by IRGMA to support their position on zone pricing. In May 2000, the *Report on Gasoline Pricing in California* was released by the Attorney General of California. On the issue of zone pricing, the report noted:

"Zone pricing is a gasoline marketing practice by which refiners establish different DTW (Dealer Tank Wagon) prices among 'zones' within the same geographic area due to the nature of competition in each area. Zone pricing also results in a wide price disparity among cities that are served out of the same terminal.

*Today, refiners often establish numerous price zones within a large city, even though the entire city is served from a single terminal and the cost of delivery to dealers in each zone is nearly identical. Some Task Force members noted that a zone can consist of a single street corner. It is common for DTW (Dealer Tank Wagon) prices in different zones to differ by as much (sic) 10 cpg (cents per gallon), with dealers located near independents receiving lower prices than dealers further removed from the influence of independents. Through zone pricing, refiners may fine-tune pricing in specific areas and isolate the impact of low-price independent retailers and other brands. Some Task Force members claim that this practice is fairly unique to refiners and would be considered an unusual practice in other industries."*⁸

⁸ *Report on Gasoline Pricing in California*, May 2000, Office of the Attorney General

Independents would assert that this pricing strategy effectively allows individual integrated oil companies who control both the wholesale and retail market to squeeze the margins of independents by narrowing the difference between the wholesale and retail price. Any losses by these integrated companies at the retail level could be offset by profits made at the wholesale level. The assertion is that in price zones where there are few or no independents the difference between the wholesale and retail price is greater, thus allowing the integrated oil companies to make more profits in the zones they control.

For example, the owner of Wanamaker's General Store in Seagrave, Ontario also operates a small gas station and buys gas from an integrated oil company with whom he also has to compete. Wayne Wanamaker explains,

*"I am a totally independent gas retailer in that I am not affiliated with any major oil companies. I purchase my gas, both regular and premium from an independent fuel wholesaler who in turn buys the fuel from Esso...Over the past months I have been taking note of the price of gas in Port Perry and I have found that for the majority of the time, my (wholesale) purchase price is the same or higher than the retail price at the Pioneer and Esso stations in Port Perry. For example, on Monday February 21st I paid 67 cents/litre and the price in town was 66.9 cents/litre...Therefore the bottom line is that I cannot afford to sell gas under these conditions nor can I afford not to sell gas...I am a very small player in the very big game but I feel I'm just as important as the Pioneer or Esso station in Port Perry."*⁹

⁹ Submission by Wayne Wanamaker, Clarington Consultation Session

What the Oil Companies Told Us

The lead stakeholder representing the major refiner-marketers of gasoline in Canada was the Canadian Petroleum Products Institute (CPPI).

Representatives from CPPI attended every consultation session held by the Task Force across Ontario. Likewise, a number of their members including Petro-Canada, Imperial Oil, Sunoco, and Shell made presentations and assisted the Task Force in better understanding the gasoline retailing industry by providing explanations of various industry practices, such as zone pricing.

The CPPI membership includes:

ARCO Products Company
Canadian Tire Corporation Ltd.
Chevron Canada Limited
Imperial Oil Limited
Nova Chemicals (Canada) Ltd.
Parkland Industries Ltd.
Pennzoil Products Canada

Petro-Canada
Safety-Kleen Canada Inc.
Shell Canada Products
Limited
Sunoco Inc.
Ultramar Canada Ltée

CPPI noted that in Ontario there are:

- ✧ 5 gasoline producing refineries
- ✧ approximately 3500 retail gas outlets
- ✧ approximately 180 bulk sales outlets
- ✧ 40,000 direct employees and another 30,000 indirect employees

In attempting to describe the factors that influence gasoline prices, the CPPI stated:

"there are three independent but concurrent markets that affect the retail price of gasoline:

- *Over the longer term, there is a direct correlation between the cost of crude oil and the pump price of gasoline. Crude is bought and sold on world commodity markets at world prices.*

"People recognize that the Canadian gasoline marketplace – and particularly the Ontario market – is highly competitive and that consumers are well served by that competition."

**Bob Clapp
Canadian Petroleum
Products Institute
Written Submission
March 6, 2000**

"When prices are high, we are accused of gouging customers. When prices are low, we are accused of predatory pricing and when prices remain stable, we are accused of collusion with other companies. Clearly, these perceptions make it challenging for us."

**Margaret Kelsch
Imperial Oil (Toronto
Consultation Session)**

- *Over the medium term, the wholesale price of gasoline obviously has a direct influence over the retail price consumers pay for it. Ontario's gasoline is priced competitively with North American wholesale markets.*
- *The day-to-day price of gasoline is set, however, by the market forces at work in local retail markets."*¹⁰

This last point was the subject of much discussion in the presentations by CPPI. After an April 27, 2000 meeting with Mr. Joe Tascona, MPP and Co-Chair of the Gas Prices Review Task Force, CPPI responded to the question of why prices vary from city to city, and from region to region in Ontario.

"Prices vary for three reasons. First, retail sites with higher volume sales, or throughput, normally need a smaller retail operating margin than low volume sites. So volume affects prices.

Second, the level and efficiency of local competition in one market vs. another.

*Third, the cost of transportation and municipal property taxes varies between regions."*¹¹

The oil companies describe the market as fiercely competitive and extremely efficient. This is reflected in the main recommendation presented by CPPI on behalf of its members:

"In conclusion, I will offer our main recommendation to the task force: Do not take any steps that would adversely affect the competitive nature of Ontario's gas market or industry efficiency. Invariably, government

"This is an industry in transition, driven by customer needs and those that do not respond to these demands face an uncertain future."

**Mark Russill
VP Retail
Sunoco Inc. (Ottawa
Consultation Session)**

¹⁰ CPPI Submission, March 6, 2000.

¹¹ Letter from Bob Clapp (CPPI) to Joe Tascona, MPP, May 7, 2000.

*regulation of the oil industry leads to higher prices on average at the pumps for consumers. And no one wants that, I am sure."*¹²

As a result, CPPI and its members focused more on responding to the comments and claims of other stakeholders. The oil companies, led by CPPI did make the following observations and proposals:

"Because such allegations (of gouging, predatory pricing and collusion) are extremely serious and injurious to our (the petroleum industry) reputation, if the task force has any evidence whatsoever of gouging, predatory pricing, or collusion, I would urge you to table it now and also to forward it to the Competition Bureau in Ottawa for investigation.

That Ontarians are paying more for gas because refiners are paying more for their raw material: crude oil. Canadians should be upset with an international cartel that is openly manipulating the price of a commodity that drives so much of our economy. Consumers should not be upset with the Canadian petroleum industry.

That the gasoline market is 'resoundingly' competitive. Twenty separate investigations across Canada have reached this conclusion.

That there is no recommendation on taxes whatsoever.

That the industry would welcome the extension of tax licences to more independent gas retailers.

That the industry would co-operate fully with any proposed reduction in the excise tax on gas to ensure it was passed on to consumers.

That the industry is committed to providing the information that people need to understand retail prices. This includes continuing the recently launched FuelFax, continuing to provide information to journalists who write about gas prices as well a continuation of the CPPI media information tours.

*That the industry will co-operate with any study or investigation."*¹³

¹² CPPI Submission, March 6, 2000.

¹³ CPPI Submission, March 6, 2000.

Fair Gas Pricing Across Canada

As part of the Task Force's deliberations, members reviewed the activities and investigations of other jurisdictions across Canada. The general consensus among many stakeholders and government decision-makers across Canada is that regulation is not the answer but fair competition is.

The question still remains, however, "Why so many investigations into gas pricing?" Part of the answer is that Canadians have been asking many questions about volatile prices and skyrocketing fuel costs. To date, no adequate explanations have been found.

Ontario is not alone in reviewing the pricing and competitive practices of the gas industry. To follow is a brief synopsis of investigations and approaches across Canada. A review will quickly indicate that, like the Ontario Gas Prices Review Task Force, other jurisdictions across Canada are united with a desire to fight for fairness at the pump.

Newfoundland & Labrador

Newfoundland does not regulate the gasoline industry. Following a provincially mandated examination, Newfoundland released the *Consumer Advocate's Report on Gasoline Prices* in December 1997. No evidence was found to support price regulation. It did find that, "the most cost-effective public policies are those designed to utilize market forces instead of using government's legislative powers to regulate price."

The province acted on recommendations in the *Consumer Advocate's Report* and established a provincial monitoring body, which reports regularly to the public on pricing information.

Nova Scotia

Nova Scotia does not regulate the gasoline industry. Until July 1991, distribution and sale of gasoline in Nova Scotia was regulated under the provisions of the *Gasoline Fuel and Licensing Act*. In 1991, the province deregulated after adopting a recommendation from a study prepared for the Nova Scotia Department of Mines and Energy.

An assessment of pricing history in Nova Scotia following deregulation (*Canadian Retail Petroleum Market Study*, MJ Ervin & Associates: 1997) concluded that, "[regulation] was likely responsible for the historically high pump prices that existed in this market until late 1992. Since then, pump prices have fallen to reflect market conditions . . ."

Prince Edward Island

PEI is the only province in Canada that currently regulates both wholesale and retail prices of petroleum products. The result of these regulations is price stability -- price jumps prior to holidays and price wars have been eliminated. There seems to be public satisfaction with regulation on the island.

PEI regulates all aspects of gasoline fuel pricing on the Island. They also regulate the price of other petroleum products such as diesel and furnace oil.

Wholesalers are normally given six opportunities each year to file for pricing adjustments that are crude oil cost-related. If the Commission's monitoring of crude oil costs indicates that prices should be reduced and applications have not been received, the Commission will initiate an investigation and/or hearing into this matter and order prices to be decreased if this is determined to be necessary. Wholesalers may apply for non-crude related adjustments once a year. Applications may be made at any other time due to extraordinary circumstances. Each refiner

must sell at a uniform price (for example, it is not possible to offer volume discounts).

The Commission also has the responsibility for determining *retailers'* minimum and maximum mark-ups from the price of the wholesale gasoline they purchase. There is a 1.5-cent spread between the maximum and minimum mark-up. Retailers may adjust their selling price within this spread without applying for approval. Thus, in the general course of events, retail sellers of gasoline would not apply for approval for changes in the selling price of gasoline. The wholesale price would dictate the retail price, with each retailer maintaining a 1.5-cent range of discretion in setting the pump price. They would, however, be free to make representations to the provincial government in respect of recommending changes in the prescribed minimum or maximum mark-ups. The minimum and maximum mark-ups were last set in April 1991, by order of the Commission.

PEI regulates a range of other factors relating to petroleum products. For example, PEI regulates a maximum difference between the selling price of premium and regular grades of gasoline.

Some studies have concluded that the price of gasoline in PEI has historically been high compared to prices across Canada. The 1997 Canadian Retail Petroleum Markets Study found that: "Charlottetown has perhaps the consistently highest ex-tax pump price of any urban market in Canada." Despite this trend, over the last year gasoline prices in PEI have been lower than the national average. This may be due to the regulatory structure, which has the effect of creating a lag in pricing changes of about three months.

It may also be important to note that, with a relatively small market and limited wholesale purchase options, there are a number of factors that make PEI's gasoline sector relatively unique compared to most other provinces.

New Brunswick

New Brunswick does not regulate the gasoline industry. In March 1997 New Brunswick released the *Final Report of the Select Committee on Gasoline Pricing*, a comprehensive review of gasoline pricing issues in the province. The Report found: "The maintenance of competition in the oil industry is the key to protecting consumers. The maintenance of fair competition and efficient markets is a federal Government responsibility."

The Final Report included a section on the impact of a two-cent per litre reduction in gasoline tax effected by New Brunswick in 1992. The Report found that during a period of two to four years after the tax decrease, gasoline prices in New Brunswick did not fall as much as in other jurisdictions. The lower rate of gasoline tax in the province thus did not produce correspondingly lower gas prices, relative to other jurisdictions. The Committee was of the opinion that for this period New Brunswick consumers did not receive the full benefit of the tax decrease.

More generally, the Report recommended not to directly regulate prices, but that increased monitoring and transparency in gasoline pricing were the best ways to ensure consistently low prices in the provinces. In order to increase transparency, amendments were made to their *Gasoline Diesel Oil and Home Heating Oil Pricing Act* to widen provincial powers relating to the gathering of information from oil companies.

A provincial body continues to monitor gasoline pricing in New Brunswick and neighbouring jurisdictions.

Québec

Since 1996, Québec has had a regulatory scheme that entails both retail and wholesale margin regulation. Since 1996, Québec has set regional,

"...The lower rate of gasoline tax in New Brunswick has not then produced correspondingly lower gas prices, relative to other jurisdictions. ...The Committee is of the opinion that [based on a longer term assessment of the period of two to four years after the tax decrease] New Brunswick consumers did not receive the full benefit of the tax decrease."

**Report of the Select
Committee on Gasoline
Pricing NB**

minimum prices for retail gasoline every week. The primary goal of government regulation is to prevent predatory (below cost) pricing, a practice that can be particularly damaging to smaller marketplace operators such as the independent retail gasoline sector.

In 1996, gasoline price wars in Québec brought the pump price of gasoline to as low as 20 cents/litre, prompting the government to intervene. For approximately one year, the Québec Ministry of Natural Resources fixed minimum weekly prices for retail gasoline. By December 1997, an administrative authority, la Régie de l'énergie, had been established and took over the function of setting regional, minimum weekly prices for retail gasoline.

The Québec Ministry of Natural Resources has the power to set *maximum* prices for retail gasoline but has indicated they would only do so under extraordinary circumstances.

Analysts have indicated that current regulatory practices have likely not had any ancillary effect on the volatility of retail gasoline prices in Québec. In other words, the price of retail gasoline remains volatile.

Manitoba

Manitoba does not regulate the gasoline industry. Gasoline price levels are a concern to the government of Manitoba, and the province's Minister of Consumer and Corporate Affairs has recently proposed the establishment of a national organization to respond to gasoline price issues on behalf of the provincial and federal governments. Manitoba has suggested that the federal and provincial governments should work together on gas price issues and that the federal government must take a leadership role.

Saskatchewan

Saskatchewan does not regulate the gasoline industry.

Alberta

Alberta does not regulate the gasoline industry.

British Columbia

British Columbia does not regulate the gasoline industry. In 1996, a report was released in British Columbia by the Jaccard *Commission of Inquiry* into gasoline pricing. The report recommended that the government not pursue market regulation or direct intervention in the gasoline industry, but that it focus on improving wholesale price competition.

In April 1999, the province announced a non-partisan committee was to review the issue of gasoline pricing in the province and report by September 1999. The results of this review were publicly released in a paper entitled, *Report on Gasoline Prices in British Columbia* in February 2000. The committee concluded that, "robust competition in the marketplace is preferable to direct government intervention in setting prices or enacting other regulatory controls."

Fairness at the Pump – An Action Plan

As could be expected with any complex issue, our investigation raised as many questions as it answered. Through the course of the hearings it became quickly evident that there is a fundamental “disconnect” between the companies that control the gas industry in Ontario and their customers. If the industry could better explain the price of gas to its consumers, the Task Force would not need to exist.

The fact of the matter is that the gasoline retail industry is made up of a handful of large, very powerful companies that exert significant influence. To say that this level of influence is, to quote the integrated oil companies, “resoundingly competitive” is to overstate the point. To say that it is “extremely efficient” (again, the oil companies words) is likely closer to reality. The question that remains is “To whose benefit does this efficiency accrue?”

Although the industry claims that 20 investigations have found no evidence of collusion or price fixing under federal competition legislation, the reality is that the industry is seen as having done a poor job in adequately justifying and explaining the volatile price of gas to the public. With the exception of the federal GST, taxes on gas are flat and have remained stable for some time – it is the job of the industry, first and foremost, therefore, to justify the volatility to their own customers – the people of Ontario.

In the opinion of the Task Force, it is the industry’s responsibility to defend its own pricing strategies and business practices. However, responsibilities related to fair and free competition in the marketplace fall within the public domain. On this point, the feedback from stakeholders makes it apparent that the federal *Competition Act* does not give the Competition Bureau the tools necessary to ensure the marketplace operates in a fair and transparent fashion. A recent report by the Global Competition Review was critical of some aspects of the work of the

Canadian Competition Bureau. This underlines the need to take action to improve public confidence in the Competition Bureau.

Ontarians would be better served by a tougher, more effective, federal *Competition Act*. The issues related to this industry cross provincial and national borders. Likewise, a renewed federal *Competition Act*, more consistent with the US federal legislation, would effectively harmonize the US and Canadian competitive rules and would level the playing field to the benefit of Canadian consumers. To address this issue, the Task Force has proposed a series of recommendations to improve the federal legislation.

Several of the recommendations contained in the report are consistent with the *Report of the Liberal Committee on Gasoline Pricing in Canada*. The Government of Canada could take a positive step by accepting the recommendations of its own caucus committee. (See Appendices I and II)

The Government of Ontario should continue to strongly press the federal government to respond to the concerns of consumers in Ontario.

Based on the evidence and submissions presented and a review of the activities in other jurisdictions, the Task Force respectfully submits the following recommendations to help promote consumer fairness at the pump, transparent competition to benefit Ontario consumers and provide more information to the consumer on how gasoline is priced and why.

Recommendation 1

Forwarding of all Submissions to the Competition Bureau with a Request for Investigation

It was the Canadian Petroleum Products Institute that strongly urged the Task Force to present any evidence of gouging, predatory pricing and collusion to the Competition Bureau. The Task Force, therefore, recommends that the Ontario government

forward to the federal Competition Bureau all submissions received by the Gas Prices Review Task Force. Specifically, we request that an investigation take place into the use of "price zones" to determine if they are a vehicle which unfairly influences prices and drive independent gas retailers out of business.

Recommendation 2

The Provincial Tax Collection Process

The Task Force recommends that the Ontario government, in consultation with the independent gasoline retailers, undertake a review of the current tax collection legislation and remove unnecessary financial barriers which may discourage the establishment of independent gasoline retailers.

The presence of independent gasoline retailers is an important component of a truly competitive marketplace, which ensures the consumer of fair gasoline prices. Investigations carried out in both Canada and the United States have stressed the linkage between a healthy and competitive independent gasoline retail market and lower gasoline prices.

Currently, the *Ontario Gasoline Tax Act* restricts the licensing of collectors to those who have at least 51% of their gasoline sale at the wholesale level. This excludes most retailers, be they independent or part of an integrated oil company, from being licensed as tax collectors.

However, those retailers who operate within an integrated oil company, which is a licensed tax collector, become tax collectors by default, as they act on behalf of the licensed company. This is as a result of their corporate structure, not due to Ontario's tax legislation.

In addition, due to changes in the *Ontario Gasoline Tax Act*, those companies that became tax collectors after 1991 must post a bond of either three months tax or one million dollars, whichever is the greater. Wholesalers who were licensed tax collectors prior to 1991 do not have to post security.

As a result of this legislation and its administration, retailers affiliated with an integrated oil company receive a cash flow advantage over independent retailers because they purchase gasoline without the tax and are only required to pay the tax to their supplier (their parent company) when they sell the gasoline to the final consumer.

Independent retailers must pay the tax at the same time they pay for their gasoline from the wholesaler. Depending upon the contract with the wholesaler, this may be at time of delivery, or a longer period of time as may be specified in the contract. Depending when the independent retailer must pay for the gasoline, a cash flow problem may occur. However, the independent retailer is not required to complete tax collection paperwork required of licensed collectors.

Recommendation 3

Provincial Monitoring of Gas Prices

The rapid rise in gas prices since late 1999 has spurred many private individuals to use the Internet as a tool to collect and post gas prices. This has provided the consumer with valuable information. However, these efforts rely on voluntary reporting by consumers and are often limited to specific areas in the province. In addition, the information is often only able to report pricing for a small period in time, thus not providing the ability for consumers to see how gas prices have been set over a long period of time, especially over the peak summer driving season.

To ensure that all consumers have the ability to see both the current and historic levels of gas prices in their area, the Task Force recommends that the Ontario government should expand its monitoring of retail gasoline prices during the peak driving season to better assess pricing behaviour before long weekends. The timing of the surveys should not be disclosed in advance.

Recommendation 4

Notice of Price Increase

The Task Force heard a number of submitters suggest that the oil companies should give advance notification of price increases. This would allow the consumer the ability to buy prior to the price of gasoline rising. It would also help identify when prices are changed, and by how much. This would compel the integrated oil companies to better explain the rationale for ongoing price volatility.

The Ontario government should consider whether a statutory requirement that gasoline retailers provide advance notification of price changes at the point of sale could benefit consumers without creating opportunities for price manipulation and price "signaling" that would make enforcement of competition laws difficult.

Recommendation 5

Corporate Accountability

The Task Force recommends that vertically integrated oil companies voluntarily produce segmented earnings reports in order to allow for a transparent understanding of the actual profits made at the pump. If the companies are unwilling to undertake this voluntary measure, the Ontario government should consider requiring segmented earnings reporting by vertically integrated oil companies.

Adoption of this recommendation would create greater transparency in the shifting of profits between crude oil production, refining and retailing. Petro-Canada and Sunoco already engage in this transparent financial reporting practice. Consumers and shareholders deserve a system where integrated oil companies are clearly accountable, as they are in the United States, regarding the true profits they are making separately at the refining, wholesale and retail levels. Acceptance of this recommendation would effectively put profits at the pump on the public record.

Recommendation 6

Transparent Competition and Ownership

There is considerable confusion in the marketplace as to the true nature of competition. For example, a number of retail gas chains such as Beaver and Pioneer are either wholly or partly owned by other major competitors in the market (referred to by some in the industry as the "gray market"). As a result of this gray market presence, consumers may think that there is more independent competition than is the case. Therefore, the Task Force recommends that retail locations partly or wholly owned by another oil company would have on their sign or receipt "wholly [or partly] owned by ____".

If gasoline retailers are unwilling to undertake this voluntary measure, the Ontario government should require this measure, using the powers already available to the Minister of Consumer and Commercial Relations.

Recommendation 7

Fair, Accurate and Clear Information for Consumers

A major concern of the Task Force is that the industry is not taking adequate steps to explain why fuel prices are volatile and what

consumers are paying for when they buy a litre of gas. For example, Petro-Canada on March 24, 2000 launched a decal program that represented the federal and provincial tax portion at 51 per cent of the cost of a litre of gas. Indeed the same week that they made their announcement the true proportion of taxes on gas was not 51 per cent but 41 per cent.¹⁴

The Task Force noted throughout the consultation process, that a number of consumers believed that tax revenue increased as the price of gas rose (while in fact the federal excise and the provincial consumption taxes on gasoline are both flat, and only the federal GST rises if the price of gas rises). Portraying the tax portion as a percentage does not assist consumers in understanding the volatility of prices. Fundamentally, flat taxes have no impact whatsoever on the volatility of the price of gas. As a result, Petro-Canada has missed an opportunity to properly educate their customers on the causes of volatility.

Another example relates to one of the common reasons offered by the industry for recent increases in the cost of diesel. In some cases, explanations included references to cold winter temperatures, which increased demand for diesel heating oil, and thus effected the price of diesel fuel. Yet, according to the most recent data, temperatures this winter in much of Ontario were the fourth warmest since 1948. In the US Northeast, it was also one of the warmer winters on record, with the overall winter temperature this year 3.4 degrees (F) higher than the average for the area. While there may be other weather related factors that remain unstated, for the average consumer, this lack of fit between

¹⁴ The average Ontario price per litre of gas on March 22, 2000 was 71.7 cents (federal tax collected, including GST, 14.7 cents; provincial tax collected, 14.7 cents; balance of all non-government portion, 42.3 cents).

what they experience and what they hear from industry spokespersons can be confusing.

Given these concerns, the Task Force recommends that the oil industry voluntarily make greater efforts to fairly, accurately and clearly inform their customers of the reasons for increases in prices and for price volatility.

Recommendation 8

Put Violators on the Defensive

Shift the Burden of Proof

The Task Force recommends that upon *prima facie* proof being provided at any hearing on a complaint regarding price discrimination (under the *Competition Act*), it becomes the burden of the person/organization charged with the violation to rebut the *prima facie* proof. This would be similar to the *US Clayton Anti-Trust Act* where oil companies have to prove that they do not price discriminate (once a *prima facie* case has been presented). This could be accomplished by amending the federal *Competition Act* and would effectively force any company perceived to be engaged in unfair business practices, such as gouging or collusion, to justify their pricing policies.

Recommendation 9

Speed up Injunctions

Allow for Private Right of Action

The Task Force recommends that the federal *Competition Act* be amended to allow for a private right of action. This would effectively allow a private or injured party to apply to the courts for an injunction and/or to sue for three times the amount of damages resulting from anti-competitive business practices, such as price discrimination and predatory pricing. Red tape would be reduced and any anti-competitive behaviour would immediately stop through a court injunction.

Recommendation 10

Improve the Ability to Prosecute Offenders

The Task Force recommends that anti-competitive offences such as price discrimination and predatory pricing, which are criminal offenses under the *Competition Act*, become prohibited conduct subject to civil review, similar to US anti-trust law. The current criminalization of pricing offences under the *Competition Act* makes it virtually unenforceable. Currently this is a contributing factor to the inability of the federal Competition Bureau to effectively investigate and prosecute companies that engage in unfair and discriminatory business practices.

Recommendation 11

New Resources for the Competition Bureau

Since improvements to the *Competition Act* alone cannot ensure that the act will be enforced, the Task Force recommends that the federal government provide the Competition Bureau with sufficient resources to allow it to effectively enforce an improved *Competition Act*.

Recommendation 12

Federal Divorcement Legislation

In a number of jurisdictions in the United States, legislation is in place that prohibits gasoline refineries and gasoline retail outlets from being owned by the same parent company. The term given to this is "divorcement", which results in the retail gasoline outlet no longer being directly owned by the integrated oil companies that own the refineries. This reduces the control that the integrated oil companies have on the retail market by removing their ability to directly set the retail price for gasoline.

The Task Force believes that, given the national reach of the major players that control the vast majority of gasoline retail outlets, the federal government should use its current consultation process on amendments to the *Competition Act*, to consider the inclusion of "divorcement" legislation nationally, which would prohibit companies from being both a refiner and retailer of gasoline.

Recommendation 13

Federal Spending on Highway Infrastructure

A number of stakeholders were unsure as to whether the tax revenue collected on gas actually went into roads. In 1998/99 the budget of the Ontario Ministry of Transportation alone accounted for about 75 cents out of every provincial dollar collected from gasoline tax.

Breakdown of Ontario Transportation Expenditures



Both the federal and provincial governments each collect about \$2 billion in taxes on gasoline in Ontario.

In 1998/99, the Ontario Government allocated \$1.5 billion to transportation, of which only \$31 million was federal money for roads.

In the same year, the federal government's investment in the provincial road infrastructure was a fraction of that invested by the province, despite the fact that both levels of government collected about the same amount. In view of the substantial revenues derived by the federal government from taxes on gasoline, and the importance of highways to economic activity and growth, the Task Force recommends that the Ontario government encourage the federal government to make more substantial investments in Ontario's highway infrastructure.

Recommendation 14

Remove the Tax on a Tax

The Task Force recommends that the federal government accept the recommendation of its own Liberal Caucus Committee and "remove the GST from other taxes and apply it only to the wholesale price for gasoline plus the retailer margin". The GST is levied on the federal excise tax and provincial motor fuels tax and is effectively a "tax on a tax". This is also the only variable tax portion on gas. As the price of gas increases so does the GST collected.

Conclusion

Industry Canada has recently announced a new study to be conducted by the Conference Board of Canada to examine the Canadian gasoline industry. In addition, the Competition Bureau has announced that it will hold public consultation on proposed changes to the *Competition Act*.

During consultation across Ontario, the Task Force heard many concerns raised with regard to the current inability of the *Competition Act* to deal with the state of competition in the gasoline retail industry. The Task Force would encourage all those with concerns to contact the Competition Bureau (<http://strategis.ic.gc.ca/SSG/ct01753e.html>), the Public Policy Forum (<http://ppforum.com/english/index.html>), the body which is carrying out the consultation, or to their local member of federal parliament. The deadline for comments is June 30, 2000.

Although these announcements by the federal government are welcome, they appear to simply be reactions to the anger the people of Canada have expressed over high gasoline prices. The proposed changes to the *Competition Act* are in fact private members bills from the federal government's own caucus. These bills, especially those proposed by Dan McTeague, have been allowed to languish for months while the price of gasoline rose to record levels.

The most urgent priority of the federal government should be not simply to review the federal *Competition Act*, but to act immediately to give the *Competition Act* and the Competition Bureau both the power and resources necessary to investigate and prosecute discriminatory and anti-competitive behaviour.

The reality is that the federal government already has reports and suggested actions from its own caucus and from numerous provincial governments including, now, the Ontario Gas Prices Review Task Force

Report. Under the current federal legislation, a continuing concentration of the wholesale market has occurred and there has been a decline in the number of independent gas retailers.

It is interesting to note that in California, the price of gasoline has been steadily declining over the last two months, despite the increase in the world price of oil.¹⁵ There is no indication that taxes in California have been lowered, or that the refiners have been able to buy oil priced below the current world market price. At the same time, the price in Ontario has risen steadily over the last four weeks, after an initial decline in late March and early April. When the integrated oil companies have been asked to explain the reason for the increase in Ontario, they have pointed to higher world oil prices.

One possible reason for this differing price regime may lie with the actions of the Office of the Attorney General of California, which has aggressively pursued the issue of gasoline pricing with the support of strong federal competition legislation.

It is the hope of the Ontario Task Force that this report and the opinions of concerned Ontarians spur the federal government to similar action.

¹⁵ California Gasoline Prices & Diesel Fuel Updates,
www.energy.ca.gov/fuels/gasoline

Appendices

APPENDIX 1

Excerpt from Report of the Liberal Committee on Gasoline Pricing in Canada - Pages 27 to 30

VIII. GOVERNMENT INVOLVEMENT IN THE OIL INDUSTRY

A Canada - United States Comparison

The current environment in the Canadian oil industry has been shaped by government policies of the past and present. Compared to the United States, Canada has considerably different government regulations to monitor the oil industry at both the federal and provincial level. However, it is clear to the Committee that federal and state involvement in the US oil industry, both historically and present day, has been on a much higher scale than what has transpired in Canada.

Federal Involvement in the US Oil Industry

For the most part, government intervention in the United States has been proactive due to consumer concern over the potential lack of price competition and too few alternative offerings in the retailing and wholesaling of gasoline. The American governmental view is that insufficient competitive rivalry could result from too high a degree of vertical integration which would result in too much market power for the refinery-marketer at both the wholesale and retail level.

Early in the 1900's the US federal government moved to break up the power and absolute control of some element of the petroleum infrastructure of the emerging oil companies, principally the Rockefeller Trust, and laid the groundwork for today's participants in the industry.

The Clayton Anti-Trust Act of 1914 (in conjunction with the Robinson-Patman Price Discrimination Act of 1936 and the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976) is the underlying legislation that is comparable, in some ways, to Canada's federal Competition Act. However, the US Act does differ in some very significant ways, primarily in the admission of prime-facie evidence with the burden of rebuttal placed on the party charged with the violation. This civil onus, as stated in Section 13 of the Act, deals with discrimination in price, services or facilities. The Canadian Competition Act contrasts sharply with American law as it relies more on a criminal, rather than civil, redress model to prosecute certain anti-competitive activities.

The result of US legislation has been a petroleum refining/marketing sector very different from the Canadian scene. No single organization has a dominant market share and the distribution infrastructure, terminals and pipelines, has a spectrum of participants – from straight terminal or pipeline operators with third party access to their facilities, to proprietary storage and pipelines.

At the market level in the US, both wholesale and retail, there are a wide variety of participants as well. Approximately 40% of the retail gasoline market in the US is in the hands of non-refiners that operate under their own name or have chosen to fly a major's brand - sometimes several major brands.

Federal Involvement in the Canadian Oil Industry

Governmental involvement in the Canadian oil industry has been characterized for the most part as being primarily aimed at nurturing and growing a Canadian producing, refining and marketing sector. Given the relative size, climate and geography of Canada in comparison to the United States, this industry is of vital importance to Canada's very being, let alone its development.

Early on, the National Oil Policy line protected Canadian oil producers. In the 1980's, a review of Canadian energy issues led the federal government to institute a National Energy Program. While that policy was to have some political repercussions and foster feelings of alienation in the west, it drove home the growing reliance of eastern Canada for access to a reliable supply of petroleum products.

The creation by the federal government of Crown-owned Petro-Canada was partly devised to enable Canada to move toward oil self-sufficiency and no longer have to rely on foreign oil companies and governments to meet its petroleum needs. However, establishing Petro-Canada, as a so-called "window into the industry" and an instrument of public policy, contributed to a sharp reduction in the number of refiners and marketers in Canada. Petro-Canada's birth brought about the removal of Petrofina, British Petroleum, Gulf, Pacific Petroleum and Cities Service from the Canadian oil industry.

The federal Competition Bureau further constricted the industry by approving a number of mergers and acquisitions while also allowing for the exit from the market of Supertest Petroleum, Canadian Oil, Turbo Resources, and Texaco Canada - a major market player and a large supplier to independent retailers.

In the case of Imperial's acquisition of Texaco Canada however, the Competition Bureau did however step in to protect existing supply contracts between Texaco and independent retailers by placing a provision that required Imperial to honour those contracts for ten years.

These contracts are however due to expire in 1999 and there are no guarantees they will be extended. To further complicate matters with respect to supply for independents, federal approval from the Competition Bureau is currently being sought for the proposed joint venture between Petro-Canada and Ultramar.

Over the years, the federal government endorsed the actions of Canada's oil industry in order to provide strong market participants with good economies of scale. Unfortunately, it also helped to establish powerful refiner-marketers who acquired large market shares and virtually total control on the distribution structure from well head to the pump.

These developments have proven costly for consumers and for the competitive climate in the industry. Measures taken by the federal government are in stark contrast to those taken south of the border to ensure a truly competitive marketplace in the US oil industry. As little was done to foster the development of a strong independent retail gasoline base, the oil industry in Canada today cannot offer the same amount of competitive forces as the US market.

State Involvement in the US Oil Industry

Approximately half of the states in the US have implemented what is widely referred to as "Fair Price" legislation to protect independent retailers from predatory pricing - a pricing tactic used by companies with market power to severely reduce and/or eliminate competition within the market. Introduction of this type of legislation by US states is particularly remarkable as no vertically

integrated marketer has a market share close to the large portions enjoyed by their counterparts in Canada.

Independent retailers, small dealers and distributors of gasoline are vital components to a healthy and competitive market. Given the uniqueness of the oil industry where independents compete against their supplier daily, independents in Canada, or even those in the United States, would not be able to survive subsidized below-cost pricing at the retail level by refiner-marketers.

Refiner-marketers have many other sources of income to subsidize any losses they suffer at the pumps when the retail price is below the wholesale price. While fair and healthy competition in marketing gasoline provides maximum benefits to the consumer, the practice of below-cost selling or discriminatory pricing impairs competition and is not in the best interest of the consumer.

Fair Price legislation is under civil law and is commonly seen in two forms: Divorcement and Below-Cost Selling Laws. There are 19 states that have some form of below cost selling legislation to prevent refiner-marketers from below cost gasoline sales to injure competition, to prevent discriminatory motor fuel allocation and rebates, and to provide for enforcement and penalties if such practices do occur.

At present, 8 states have divorcement laws to prohibit refiners from operating major brand, secondary brand, or unbranded retail outlets. Divorcement legislation can also prohibit refiners from selling gasoline at retail through employees, commissioned agents, subsidiary companies, or by persons who have a contractual fee arrangement with the refiner.

Vertically integrated refiners enjoy two principal advantages over non-integrated competitors in retail petroleum markets: the refiner is sheltered from the vagaries of wholesale markets; and the refiner can pass along to its retail arm any economies it has realized in its upstream business operations. The purpose of divorcement is to limit the abusive use of that advantage that vertically integrated marketers have over independent retailers in the petroleum market and to prevent the control and concentration of power at retail.

Opponents of fair price legislation warn that it will result in higher prices for consumers. However, there is a lack of evidence to support this view. The 27 US states that have some form of fair price legislation in place, either divorcement or below-cost selling, remain highly competitive markets. In fact, other states are planning to introduce similar legislation in the near future.

Provincial Involvement in the Canadian Oil Industry

Over the years, regulatory involvement by provincial governments in the Canadian oil industry has been minimal. In fact, only Prince Edward Island has an extensive regulatory framework involving all aspects of retail gasoline, including pricing and margins. It is the only province in Canada today that maintains government control over prices, margins and structures. The result is that while PEI does not have volatile roller coaster prices at the pumps, consumers get no bargains either. Gasoline prices tend to be set at a higher level than in most other parts of the country.

Several provincial governments, both in the past and recently, have taken an interest with respect to the oil industry and gasoline pricing in their jurisdictions. While the degree of involvement varies, provincial governments are becoming more concerned today about how the oil industry conducts its business.

While none of the provinces have gone so far as to completely regulate the industry like PEI, they are no longer ignoring public demands that the industry be investigated and that consumer interests be given a higher priority. A number of provincial governments have taken a closer look at the oil industry and are taking steps to further protect consumers and promote fairness in the industry.

APPENDIX II

Excerpt from Report of the Liberal Committee on Gasoline Pricing in Canada - Pages 36 to 41

IX. THE FEDERAL COMPETITION ACT

Ensuring the Protection of Consumers and Fostering True Competition

As discussed in Section VIII, there is a role for federal and provincial governments in Canada's oil industry. That role however should not be as of a heavy-handed regulator. A more appropriate role is to protect consumers and foster true competition in the industry. The Committee was told the industry did not require severe government intervention. With respect to pricing, there were no requests for governments to regulate gasoline prices. Many presenters felt governments have the necessary tools to protect consumers and improve the industry and that only a few key adjustments are required.

The Committee accepts the view that the primary role of governments in the oil industry should be to protect the interests of consumers and enhance competitiveness. To fulfill these goals, it became apparent to the Committee that legislative changes are required in certain areas. These changes can be brought about in a manner that would not unduly disrupt the operations of the industry.

One concern the Committee did hear was that whatever legislative actions come from either the federal or provincial governments, they must not be hindered by jurisdiction disputes, duplication and overlap. It is important that both levels of government act to address problems in the oil industry in a coordinated and effective manner.

Some provincial governments have taken steps to review how the oil industry operates in their jurisdictions. As well, some have enacted legislation to deal with problems they believe exist in the industry. For its part, the federal government enacted legislation in the past to protect the interests of consumers and industry participants alike. However, as far as the Committee is concerned, while the objectives of the federal government are laudable and must be retained, the ability to achieve them has been somewhat lacking.

The Competition Act and the Need for Amendments

The Committee believed it was important to examine existing federal legislation and determine what could be done to better reinforce the goals of protecting consumer interests and fostering a truly competitive oil industry. The legislation primarily concerned with these two objectives is the federal Competition Act.

The Committee recognized early on that at the heart of public concern about the oil industry and how it prices petroleum products was the commonly held belief that the federal Competition Act is a toothless tiger. Virtually every consumer organization and independent retailer appearing before the Committee shared this sentiment. Some provincial studies on gasoline pricing also concluded that the Act needs amendment. It is to the noted deficiencies in the Act that the Committee devoted considerable attention.

Predatory Pricing and the Competition Act

According to the Bureau of Competition Policy, predatory pricing is a situation where a dominant business charges low prices over a long enough time so as to drive a competitor from the market or deter others from entering the market. Having accomplished that, the company raises prices to recoup losses. The activity must have the effect of substantially lessening competition or eliminating a competitor to be viewed as being anti-competitive.

In 1986, The Restrictive Trade Practices Commission, in its report Competition in the Canadian Petroleum Industry, recommended to the federal government that the then Competition Tribunal should apply the following guidelines to determine the limits of appropriate pricing in the dual distribution context petroleum industry:

1. Independents should not be required to pay more, at any time, than the lowest retail price charged in the independents' market area by the supplier (i.e. at outlets where the supplier sets the pump price), less reasonable product transportation cost.
2. A refiners' net return from retail sales should be no less than the net return on its sales to either branded dealers or independents in any market area.

The Committee believes these guidelines would assist in combating predatory pricing. In Ontario for example, four refiner-marketers hold approximately 80-85% of the gasoline market. That domination impacts on the level of competition and provides a framework that can permit control over wholesale and retail gasoline pricing.

Independent retailers are a major source of competition in the oil industry and help provide consumers with access to lower gasoline prices. However, the Committee believes that measures in the current Competition Act are unable to react effectively to, and defend against, certain anti-competitive acts.

The Committee believes that if predatory pricing occurs in the oil industry, the Act, as it is currently stands, is unable to effectively combat against it. The Committee supports the view of the New Brunswick Select Committee that the Act "has little effect in preventing discriminatory pricing or predatory pricing". The federal government has to address this concern and take immediate steps along the lines of those recommendations outlined in the 1986 Restrictive Trade Practices Commission's report.

The Committee recommends that the Competition Act be amended to provide better protection for purchasers of products from integrated suppliers, and who also compete with that supplier at the retail level. A fair opportunity to make similar profits from the retail sale of a product must be afforded to a purchaser as that already enjoyed by a supplier.

Criminal versus Civil Model in the Competition Act

Under the Competition Act, the burden of proof in several anti-competitive acts is one where the illegal activity must be proven beyond a reasonable doubt. According to New Brunswick's Select Committee, "in large part, because this burden of proof is so difficult to satisfy, Industry Canada indicated there are very few cases extant in this area". In fact, only one or two cases have gone to court and the provision itself is not used very often.

The Consumers Association of Canada suggested to the Committee that revisions to the Competition Act placing some provisions under civil law could make for more effective legal

instruments for ensuring a greater level of competition in the market. The CAC believes there are aspects of the market that discriminate against the activities of independent retailers. If relevant portions of the Act were under civil law, it could help reduce these distortions and abuses.

The New Brunswick Select Committee recommended to the provincial government that it "urge the federal government conduct a fundamental review and assessment of the Competition Act to determine whether its criminal law model effectively serves the public policy goal of preventing discriminatory or predatory pricing to substantially lessen competition".

The Select Committee proposed that the alternative model to consider would be based on providing civil remedies to consumers and victims of discriminatory or predatory pricing. It is the opinion of the Select Committee that this type of a system could afford more protection to consumers.

As the Select Committee cautions that a review could take time, it suggests that the New Brunswick Government enact provisions within its jurisdiction to address the risk that predatory or price discrimination could reduce competition in the industry to the detriment of consumers. The provisions would prohibit wholesalers from charging wholesale prices higher than retail prices at their customer stations in the same area, and require public posting of wholesale price schedules according to purchase volumes and terms at all wholesale racks in the province.

The Committee believes that based on the evidence it has received, a review would indeed be time consuming. A delay in amending the Act would not be in the best interest of consumers or independent retailers. Measures to improve provisions dealing with predatory and discriminatory pricing have to be taken at the earliest opportunity in order to prevent more independent retailers having to exit the market.

The Committee therefore recommends that the federal government immediately act to replace the criminal burden of proof model currently used in sections of the Competition Act dealing with predatory pricing and price discrimination.

Whistle Blowing Provisions for the Competition Act

The Committee is very disturbed that persons with information on anti-competitive acts have no protection under the Competition Act to enable them to provide such information without fear of future consequences.

If the Act endeavours to protect consumers and industry participants from anti-competitive activities, it should also protect employees who refuse to participate in an illegal activity or who want to provide information to the Competition Bureau.

The Act should provide protection for individuals in any industry who wish to provide anonymous information that will assist in evidence gathering and the prosecution of anti-competitive activities in the Canadian market.

With respect to the oil industry, protection should be afforded to employees or independent contractors who, upon receiving orders from company officials to raise or lower prices, refuses to do so because they believe an anti-competitive act is being committed.

There is a need for the Competition Act to better protect consumers from those who deliberately violate Canada's competition laws. There is also a need to protect those who wish to report, or refuse to participate in, an anti-competitive act by their employer.

The Committee believes that if the Competition Act had a whistle blowing provision, the Bureau of Competition Policy may have been more successful in prosecuting some of the cases it had before it of alleged anti-competitive activity.

The Committee therefore recommends that the Competition Act be amended to provide provisions to permit a person to report an offence under the Act to the Bureau of Competition Policy anonymously, and permit a person to refuse to take action for an employer that constitutes an offence under the Act.

The Committee further recommends that any employer who dismisses or disciplines an employee for either reporting an anti-competitive act or refusing to comply with an order to do so, is guilty of a criminal offence and liable to a fine or imprisonment, or both. Dismissed or disciplined employees would also have recourse to civil remedies against a culpable employer, including reinstatement.

Price Fixing and Collusion

The Bureau of Competition Policy has investigated numerous allegations of price fixing and collusion in the Canadian oil industry. To this date, it has found little evidence to support these claims.

The Committee is concerned that deficiencies in the methodologies used to obtain evidence, and the restrictive parameters of provisions in the current Competition Act, are such that investigations are doomed to failure. Some industry participants believe that regardless of whether price fixing or collusion actually takes place, the Bureau's investigative techniques along with deficiencies in the Competition Act make it virtually impossible to uncover sufficient evidence to prosecute these anti-competitive acts. Moreover, the Committee believes the burden of proof criminal model, as discussed previously, sets too high a standard for achieving the necessary evidence to convict.

Notwithstanding the concerns noted above, the Committee is of the opinion that price fixing and collusion does not occur in the oil industry for the reason that it doesn't have to. The Committee accepts the view that price signs on retail outlets can be an easy way for market participants to achieve the same results that price fixing and collusion are supposedly said to bring without having to resort to any illegal activity.

The Committee heard evidence that suggested price increases and decreases are set by a recognized price leader in a given region. Some presenters added that as long as there are price leaders and price followers, the market would continue to display the commonly seen uniform, lock step, pricing mentality that it currently displays.

In a truly competitive market, prices should not go up or down based solely on the actions of one participant. If the market sets pump price based on supply and demand, and if that market has a high level of competition and price volatility, no one retailer could effectively dictate pricing over an extended period of time. Nevertheless, that is exactly what Canadian consumers see happening in the oil industry. If true competition existed in the industry, sustained price increases would not ordinarily occur. They certainly would not occur as often as they do today in some Canadian markets.

Consumers point out that gasoline prices do not come down as fast as they went up. The Committee has yet to hear a rational explanation for this phenomenon, beyond the public perception that oil companies are trying to get as much out of high prices as they can. In a highly

competitive market, prices should be challenged on a daily basis, as is the case in some urban markets where there are a significant number of independent retailers.

The Committee believes price fixing and collusion does not take place in Canada's oil industry. However, given the current measures at its disposal, if such anti-competitive acts did occur, the Bureau of Competition Policy has little chance of discovering, let alone prosecuting, them.

Price Discrimination and the Competition Act

According to the Bureau of Competition Policy, price discrimination is being party to a sale that discriminates against the competitors of a purchaser of an article by granting a discount or other advantage to that purchaser which is not available to competitors at the time of sale.

There are examples of price discrimination in the Canadian oil industry. New Brunswick's Select Committee was told of cases where specified retailers were charged more for gasoline than the retail price at outlets displaying the brand of their supplier.

In the view of the Select Committee, "it is clear that price discrimination has occurred such that different outlets in the same market area are paying substantially different wholesaler prices from the same supplier".

The Committee agrees with the Select Committee that price discrimination threatens competition in a given region and that it can force both branded and unbranded independent retailers out of the market or, at least, out of the price setting process.

The Committee believes that little has been done to combat such activity and hopes a strengthened Competition Act will assist the Competition Bureau in investigating this matter with greater vigour in the future.

The Committee believes that the addition of a whistle blowing provision in the Act and the implementation of a civil model to prosecute anti-competitive activities will assist the Bureau in its investigations of price discrimination cases.

Eliminating price discrimination would benefit competition and consumers. Independent retailers would have equal and fair access to similar priced product as their refiner-marketer competitors, and consumers would benefit with independents being able to compete effectively at the retail level with their branded competitors.

APPENDIX III

Excerpt from Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice - Pages 22 to 24

By: J. Anthony VanDuzer, Gilles Paquet, University of Ottawa

October 22, 1999

PART II *Competition Act Provisions Dealing with Anticompetitive Pricing*

Statutory Scheme of the *Competition Act*

Introduction

There are a variety of provisions of the *Competition Act* dealing with the three types of anticompetitive pricing addressed in this study: price discrimination, predatory pricing and price maintenance. Some are criminal offences. Others are contained in Part VI, the civil part of the *Act*. Where there is a contravention of a civil provision, the Commissioner may apply to the Competition Tribunal for an order prohibiting the person engaged in the anticompetitive behaviour from continuing it. The main requirement for the Tribunal to make such an order is that there be some specified effect on competition. In the following sections of this Part, the law as interpreted by the courts as well as the Bureau's *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* is set out.

We begin with a general overview of all the relevant provisions of the *Act*. The more detailed discussion which follows is confined to the three criminal provisions dealing directly with price discrimination, predatory pricing and price maintenance and the abuse of dominance provision.

Price Discrimination

The *Act* contains a variety of provisions dealing with situations in which different prices are charged to different customers. Some of these refer to such pricing practices as "discrimination" even though the economic requirements for true discrimination discussed in Part I may not be present. In the following discussion, we will use discrimination in this broader sense as referring to all situations in which differential pricing is used.

The general price discrimination provision is section 50(1)(a) of the *Competition Act*. Price discrimination by a seller in its sales of articles to buyers purchasing the same quality and quantity and who compete in the same market is a criminal offence in certain circumstances. As well, section 61, the general price maintenance provision, which makes it a criminal offence to refuse to supply a person because of the person's low pricing policy, also makes it an offence to "otherwise discriminate" against a person for that reason. Otherwise discriminating for the purposes of section 61 may include price discrimination.

Several provisions dealing with price discrimination appear in the civil part of the *Act*. Outright refusal to deal with a customer, the ultimate discriminatory act, is specifically addressed in section 75. Relief is available, however, only in certain circumstances, including the inability of the customer to obtain supply from other sources in the market. Under section 76, the Competition Tribunal may order that a seller discontinue a practice of consignment selling where it finds that the

practice has been introduced for the purpose of price discriminating. Section 76, unlike section 50(l)(a), extends to "products", not just articles. Under the Act, "products" includes services.

Discrimination in the form of "delivered pricing" may also be subject to an application to the Tribunal under section 80. Delivered pricing means refusing to deliver articles at a particular location on the same trade terms as the supplier delivers the article to other customers at the same location.

Section 77 of the Act deals with certain practices which may involve price discrimination. The Competition Tribunal may make an order prohibiting the practice of granting price concessions to induce a customer to deal exclusively in a particular product or refrain from dealing with a particular product, if certain requirements are met, including the requirement that competition is or is likely to be lessened substantially. Also, where discrimination in the pricing of one product by a supplier is used as an inducement for a buyer to acquire some other product, the supplier is engaged in tied selling and the Tribunal may make an order prohibiting the discrimination where the same competitive effect test is met.

Discrimination may also take the form, not of price differences, but of differential access to promotional allowances. Section 51 makes such discrimination a criminal offence in some circumstances.

Predatory Pricing

Predatory pricing is addressed in section 50(l)(c), which prohibits "unreasonably low pricing" having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have either effect. Where price discrimination is practised by a seller in connection with its sales in different regions of the country with the same predatory consequences, an offence is committed under section 50(l)(b).

Price Maintenance

Price maintenance is a criminal offence under section 61. The offence is committed regardless of whether the activity designed to maintain prices is engaged in horizontally by one competitor against another or vertically by a supplier in relation to a customer. Refusal to supply because of a person's low pricing policy is also prohibited though certain defences are available. Under section 61(6), any person who attempts to induce a supplier to refuse to supply by imposing such refusal as a condition of doing business with the supplier is also guilty of an offence. Under section 76, the Competition Tribunal may order that a seller discontinue the practice of consignment selling where it finds that the practice has been introduced for the purpose of resale price maintenance.

Abuse of dominance

Price discrimination, predation and price maintenance may also be addressed under the abuse of dominance provision, section 79, where the requirements of that provision are met. The conduct must be found to be an abuse of market power by a dominant firm with the effect or tendency of substantially lessening competition. Section 78 sets out a non-exhaustive list of acts which may be found to be an abuse of dominant position, some of which refer to pricing practices.

Other Provisions

Certain other provisions of the Act are relevant to a discussion of anticompetitive pricing practices, though they are not within the terms of reference of this study. Agreements to fix prices among competitors are prohibited under section 45 where the result is an undue lessening of competition.

As noted above, horizontal price fixing may also be addressed under section 61. It was suggested in Part I that market power is required before most pricing practices will have anticompetitive effects. Mergers may create the structural requirements for the exercise of market power and are regulated under the *Competition Act*. Abuse of market power by merging entities in the form of anticompetitive pricing practices might be considered in relation to whether the Commissioner would seek to challenge a merger.⁷⁷

Under section 36 of the *Act*, all the criminal offences under sections 50, 51 and 61 may be the subject of private civil proceedings by anyone who has suffered damages as a result of the commission of the offence. Breaches of the civil provisions, sections 75, 76, 77, 79 and 80, may not be the subject of private action.⁷⁸

APPENDIX IV

Excerpt from Report on Gasoline Pricing In California - Page 26

California Department of Justice, Attorney General Bill Lockyer

May 2000

Zone Pricing

Zone pricing is a gasoline marketing practice by which refiners establish different DTW prices among "zones" within the same geographic area due to the nature of competition in each area. For example, a refiner may sell to Dealer A at a lower price than it sells to Dealer B in the same city when Dealer A has a low-price independent competitor nearby (and Dealer B does not). Zone pricing also results in a wide price disparity among cities that are served out of the same terminal. ARCO, in a presentation to the Task Force, noted, however, that differences in DTW prices within a zone often do not directly translate into retail price differences. ARCO presented a survey to the Task Force showing that differences in retail prices at ARCO stations in San Diego were not explained solely by differences in DTW prices.

Historically, refiners typically sold to their dealers throughout an entire city or major geographic area at the same price, with allowances for volume. Accordingly, if a refiner desired to match the prices set by low-price independents, it would have to lower its price to all dealers in the city, rather than just to those dealers with low-price independents nearby.

Today, refiners often establish numerous price zones within a large city, even though the entire city is served from a single terminal and the cost of delivery to dealers in each zone is nearly identical. Some Task Force members noted that a zone can consist of a single street corner. It is common for DTW prices in different zones within the same city to differ by as much 10 cpg, with dealers located near independents receiving lower prices than dealers further removed from the influence of independents. Through zone pricing, refiners may fine-tune pricing in specific areas and isolate the impact of low-price independent retailers and other brands. Some Task Force members claim that this practice is fairly unique to refiners and would be considered an unusual practice in other industries. The Utility Consumers Action Network (UCAN) noted the price of a Big Gulp soft drink is typically the same across stations in a metropolitan area, yet the price of gasoline may vary more than 10 cpg for a given brand.

APPENDIX V

Excerpt from Report on Gasoline Pricing in California – Pages 31 to 33

California Department of Justice, Attorney General Bill Lockyer

May 2000

2. Zone Pricing Prohibitions

The Task Force considered whether elimination of zone pricing would reduce wholesale and retail prices, particularly in relatively higher priced areas within the state. One method, called fair wholesale pricing, prohibits refiners from establishing price zones and requires them to charge the same price to all dealers supplied by a given terminal, except that the refiner could add the actual cost of delivery.

Arguments in Favor of Zone Pricing Prohibitions

Proponents contend that prohibiting zone pricing would increase competition and lower retail prices in certain areas. The prohibitions could also prevent refiners from having *de facto* control over dealer margins. For example, a refiner would not be able to raise the wholesale price charged to dealers in areas that support higher pump prices as a way to capture incremental profit in those areas. Likewise, retailers contend, a refiner would not be able to adjust wholesale prices downward in a certain area in order to drive a rival from that market and reduce competition. Prohibiting refiners from adjusting prices based on local conditions would prevent them from setting the retail margins that lessee-dealers earn. Since dealers then would pay the same cost for supplies adjusted for transportation cost differences, dealers in high price areas may be able to reduce prices at the pump and increase market share without eroding their profit margin.

Petroleum companies claim that zone pricing enables the brand to maintain market share in a specific area by reducing prices in response to price competition from other brands in that area. Some Task Force members noted that petroleum companies receive information on their competitors' pump prices through various reporting services, such as Lundberg. Petroleum companies responded that adjusting prices downward in response to competition in certain areas helps lessee dealers maintain margins and volume sold. In its presentation, ARCO stated that price zones enable the company to meet the standards of the Robinson-Patman Act, which require refiners to sell gasoline of the same grade and quality at the same price to all of their stations in direct competition with each other.³⁹

Retailers argue that petroleum companies create zones not based upon geography but instead upon undisclosed criteria, citing as evidence that different prices are charged to retailers in close proximity to one another and that zones may contain only one station. Zone pricing may enable petroleum companies to adjust DTW prices upward in targeted areas so they can extract higher prices from those dealers and their customers. Retailers thus claim that the objective of zone pricing is to limit competition, arbitrarily increase prices to consumers in certain areas, and fix dealer margins, essentially determined to be the difference between pump and DTW prices. Retailers suggest that by setting dealers' margins, a refiner could effectively increase profit.

Arguments Against Zone Pricing Prohibitions

WSPA contends that prohibitions on zone pricing will lead to higher prices and less competition in certain areas. For example, if the wholesale price charged to dealers in one area could not be lowered in response to market conditions, price competition in the area would be limited. Petroleum companies suggest those dealers would lose retail margins and market share to competitors and consumer prices would be higher.⁴⁰

Additionally, CIOMA claims that fair wholesale pricing may lead to elevated price levels at the rack. For example, a refiner may choose not to set a market price that reflects its cost of production, but instead may choose a higher price that maintains the same total wholesale margins as it earned with zone pricing. A high market price would disadvantage dealers and jobbers in low-cost areas, high-volume jobbers that could no longer receive volume discounts, and all of their customers. However, it is unclear whether uniform pricing across regions could be a viable strategy for refiners since they would stand to lose sales to competitors.

WSPA also expressed concern about price adjustments to different dealers that could only reflect the relative cost of doing business. In particular, petroleum companies stated, "there would be a great deal of difficulty in precisely identifying these various costs."⁴¹ Petroleum companies specifically point to their practice of subsidizing rents charged to lessee-dealers, with the understanding they would recoup lost rent through sales to their dealers.⁴² Petroleum companies fear the adjustments allowed under Fair Wholesale Pricing may not enable them to fully recover their costs, and possibly deter them from future station investments.

Petroleum companies also noted that federal and state laws explicitly forbid price fixing or zone pricing that lessens competition,⁴³ making zone pricing prohibitions unnecessary.⁴⁴

Others on the Task Force expressed concern that refiners may attempt to increase their non-fuel charges, such as rent to lessee-dealers, in order to fully recoup all profits lost under fair wholesale pricing. Potential competitive benefits from zone pricing prohibitions would then not be realized.

³⁹ ARCO Products Company presentation to the Task Force on February 9, 2000.

⁴⁰ ARCO Products Company presentation to the Task Force on February 9, 2000.

⁴¹ Letter from John Geoghegan regarding the legislative proposal circulated by Tim Hamilton, dated March 29, 2000.

⁴² Letter from John Geoghegan, dated March 29, 2000.

⁴³ California Business & Professions Code, section 21200.

⁴⁴ Letter from John Geoghegan, dated March 29, 2000.

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Canadian Petroleum Products Institute (Bob Clapp)
Canadian Renewable Fuels Ass. (Jim Johnson)
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Phoenix Transportation (Archie Groth)
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Quantum Lighting & Electric Co. (Miro Fratic)
Shell Canada (Patrick Creaghan, V-P Ont. Markets)
Simcoe County School Bus Operators Association
Sinton's Esso
Elwood Smith
Stop4Gas Enterprises (David Ge)
Sunoco Inc. (Mike Russill, V-P Retail)
Tall Trees Trucking Co. (Arnold Portt)
Thunder Bay Chamber of Commerce - Transportation Committee (Iain Angus, Bob Tindall)
Triple 'S' Sanitation
Norm Tufts
Paul Varty
Noble A. Villeneuve, Consultant
Wanamaker's General Store
Wilson Fuel Company Ltd. (Dave Collins)

¹⁶ Did not provide consent to share submission

Written Submissions Only

Organization/Name

Florence E. Bremner

Kirstin Cooke

Ken Deyette

B. Elsworthy

Environment North (John N. Boutler)

In-Touch Software Corp. (Ian Wyder)

Ken Irvine

Mr. & Mrs. Robert McPeak

Parry Sound Area Chamber of Commerce (Phil Harrison)

Reduce Gas Pains (Wally Moran)

Sault Ste. Marie Chamber of Commerce (Arthur Taylor)

Timmins, City of (Mayor Vic Power)

Timmins Economic Development Corp. (Kathy Keast)

Patricia Ann White